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No. 03-1243

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

– *IN RE* GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.

On Petition for a Writ of Mandamus to the Supreme Court of South Carolina

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BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The petition for a writ of mandamus should be denied because the proceedings in the state courts on remand, though not yet complete, are fully in accord with this Court's mandate, and petitioner has shown no grounds for this extraordinary relief. In its opinion in this case on June 23, 2003, this Court held that the permissibility of class-wide arbitration is a matter of case-by-case, state-law contract interpretation for the arbitrator to decide. Pet. App. 8a-11a. Because four of the six justices in this Court's majority thought that "what happened in arbitration" on that question of contract interpretation was not entirely "clear," the Court remanded for further proceedings. Pet. App. 11a. The plurality acknowledged that the arbitrator might already have independently determined that Green Tree's arbitration clause permitted class arbitration, quoting the arbitrator's own order

in which he said "*I* determined that a class action should proceed in arbitration based on *my* careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 12a. A state trial court had earlier read the clause the same way, however, and this Court had not previously delineated arbitrators' and courts' respective roles in deciding such questions. Accordingly, because the "record suggest[ed]" that "the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's decision," this Court decided to "remand the case so that this question may be resolved in arbitration." Pet. App. 6a, 12a.

In response to this Court's order vacating the judgment of the South Carolina Supreme Court and remanding for further proceedings, the state high court remanded to the arbitrator (a former state court circuit judge), who has now unmistakably confirmed in a written order that he did, in the first instance, independently interpret the contract to permit class arbitration, and that he continues to adhere to that view. *Id.* at 3a, 20a-22a. The procedure and substance of the state courts' and the arbitrator's actions are fully consistent with this Court's mandate. Contrary to petitioner's contentions, this Court did not hold that the arbitration awards violated the FAA. Moreover, FAA §§ 9 and 10 do not apply, and do not require an approach different from that which the state courts and arbitrator have thus far pursued under the mandate.

Respondents won their judgments twenty-seven months before Green Tree filed for bankruptcy protection, and petitioner was required to post bonds to secure them. Petitioner (now a liquidating trust in bankruptcy known as the CFC Estate) long ago exhausted its challenges to the merits of the arbitrator's decision that the company wilfully and egregiously violated the statutory rights of over 3,600 South Carolina consumers. Petitioner is nonetheless waging an aggressive campaign, repeatedly (and thus far unsuccessfully) seeking on procedural grounds in various fora to vacate the

state court judgments, release the bonds, recover the collateral, and convert respondents from secured to unsecured creditors in bankruptcy to minimize their recovery on the judgments. This petition is but the latest effort to achieve vacatur of the state trial court's judgments confirming the arbitration awards, in order that petitioner might then attempt to argue for release of the bonds securing those judgments and eviscerate respondents' recovery. The South Carolina Supreme Court, following full briefing, correctly applied state procedural law to deny petitioner's motion to vacate the underlying judgments. Pet. App. 1a-4a. The current petition invites this Court to second-guess and micro-manage the state courts' procedures for remitting this case to the arbitrator, and should be denied.

Background

Pre-mandate State Court Proceedings. This case originnated as two separate actions against Green Tree Financial Corporation in the South Carolina State Circuit Courts. (*Bazzle v. Green Tree*, C/A No. 97-CP-18-258, and *Lackey v. Green Tree*, C/A No.96-CP-06-073). In 2000, the Bazzle/ Lackey plaintiffs (respondents here) obtained two separate judgments against Green Tree. Each judgment confirmed an award by the same arbitrator, who found that Green Tree had willfully violated the South Carolina Consumer Protection Code.

Green Tree appealed, and the South Carolina Supreme Court assumed immediate jurisdiction. As a condition of obtaining a stay pending appeal, Green Tree in December 2000 and June 2001 obtained state trial courts' approval of supersedeas bonds securing the judgments. On August 26, 2002, the South Carolina Supreme Court affirmed the judgments, ruling that the arbitrator had authority to arbitrate the Bazzle/Lackey actions on a class-wide basis. In early November 2002, each of the trial courts granted Green Tree's

motion to stay enforcement of the judgments, expressly conditioning the stay on Green Tree making timely deposits of post-judgment interest that continued to accrue in the interim. *Bazzle v. Green Tree Fin. Corp.*, No. 00-CP-18-793, slip. op. (Nov. 6, 2002) (order of state circuit court awarding interim interest), Opp. App. 2a; and *Lackey v. Green Tree Fin. Corp.*, 96-CP-06-073, slip op. (Nov. 6, 2002)(order of circuit court awarding interim interest), Opp. App. 5a.

Pre-mandate Bankruptcy Court Proceedings. On December 17, 2002, Conseco Finance, formerly known as Green Tree, filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. The pendency of bankruptcy proceedings automatically stayed all litigation by or against Green Tree. On January 21, 2003, after petitioner had already filed its petition for certiorari in this Court, petitioner obtained an order from the bankruptcy court providing that "the automatic stay is hereby annulled retroactively to the Petition Date for the limited purpose of prosecuting the Supreme Court Action . . . . " *In re Conseco, Inc.*, No. 02 B 49672, slip. op. at 2 (Bankr. N.D. Ill. Jan. 21, 2003) (order lifting automatic stay).

This Court's Decision and the Mandate. This Court granted certiorari on the question "[w]hether the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (FAA), prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration." 123 S. Ct. 2402, 2404 (2003). In its June 23, 2003 opinion, this Court rejected petitioner Green Tree's contention that class-wide arbitration under a predispute arbitration clause not expressly authorizing class proceedings violates the FAA, instead holding that the permissibility of class-wide arbitration is a matter of case-by-case, state-law contract interpretation for the arbitrator to decide. Pet. App. 11a-12a (plurality opinion); *id.* at 13a (Stevens, J., concurring

in the judgment); *id.* at 19a (Thomas, J, dissenting in favor of outright affirmance).

This Court recognized that the arbitration clause might correctly be read to permit class arbitration.[1] The opinion also expressly acknowledged the possibility that the arbitrator had already independently read the arbitration clause to authorize him to proceed on a class basis, noting that the arbitrator stated that he based his award on "*my* careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 12a.[2] The Court also saw reason for some uncertainty as to what had occurred. Pet. App. 6a (noting that the "record suggests" that the arbitrator may not yet have made an independent decision), *id.* at 11a (observing that "what happened in arbitration" was not "clear"). Until this Court decided this case, the law was undeveloped as to whether the permissibility of class arbitration is ordinarily a

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[1] Green Tree argued that the clause's reference to resolution of disputes "by one arbitrator selected by us [Green Tree] with consent of you [Green Tree's customer]" foreclosed class arbitration, but this Court observed that "[t]he class arbitrator *was* 'selected by' Green Tree 'with consent of' Green Tree's customers, the named plaintiffs. And insofar as the other class members agreed to proceed in class arbitration, they consented as well." Pet. App. 9a.

[2] Indeed, Green Tree's own original briefs to the South Carolina Supreme Court, in advance of this Court's decision, repeatedly asserted that the *arbitrator* was the one who had interpreted the contract. Green Tree asserted that the arbitrator "*took it upon himself* to determine the propriety of a class-wide arbitration and certify a class" Final Brief of Appellant, at 29, *Bazzle v. Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed December 6, 2001), that "the arbitrator, *on his own*, imposed class-wide arbitration and certified a class" Final Brief of Appellant, at 12, *Bazzle v. Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed December 6, 2001), and that the arbitrator "decided the class action issue *himself*." Final Brief of Appellant, at 2, *Bazzle v. Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed December 6, 2001) (emphases added).

matter for courts or arbitrators to decide. The Court expressed concern that the arbitrator, who interpreted the clause to permit class arbitration after a state trial court had already read the clause the same way, might not have appreciated that the decision was his to make in the first instance. Pet. App. 12a. Because four of the six justices in the majority thought that "what happened in arbitration" on the contract interpretation question was unclear, the Court remanded for further proceedings to clarify the arbitrators' decision. Pet. App. 9a, 11a.[3]

This Court's mandate directed that "the judgment of the above court in this cause [the Supreme Court of South Carolina] is vacated with costs, and the case is remanded to the Supreme Court of South Carolina for further proceedings not inconsistent with the opinion of this Court." *Green Tree v. Bazzle*, Case No. 02-634 (Aug. 6, 2003) (Mandate of this Court). Neither the mandate nor this Court's opinion makes any reference to or purports to disturb the underlying arbitration awards or trial court judgments confirming those awards.

Post-mandate State Court Proceedings. In response to the United States Supreme Court's mandate, on August 6, 2003, the South Carolina Supreme Court *sua sponte* returned this matter to the arbitrator "for further proceedings not

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[3] Justice Thomas concluded that the FAA simply does not apply to proceedings in state courts, and thus lacks any preemptive force here. Pet. App. 19a (Thomas, J, dissenting). He "would leave undisturbed the judgment of the Supreme Court of South Carolina." *Id.* Justice Stevens also saw no need to remand, "because the decision to conduct a class arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker." *Id.* at 13a (Stevens, J., concurring in the judgment). Justice Stevens "would simply affirm the judgment of the Supreme Court of South Carolina," but concurred in the judgment to remand in order to avoid a decision lacking a controlling judgment. *Id.*

inconsistent with the opinion of that Court."[4] Letter from Clerk of Court, South Carolina Supreme Court, to Thomas Ervin, at 1 (Aug. 6, 2003), Opp. App. 9a. On August 12, 2003, the arbitrator addressed the question of contract interpretation in an order that provides, in relevant part:

> I wish to clarify my prior rulings that the arbitration clause contained in these adhesion contracts written by Green Tree were silent as to class certification in arbitration . . . . I applied South Carolina contract law in construing this broad arbitration clause drafted by Green Tree. I concluded that since the arbitration clause was silent as to class treatment that class certification was appropriate. I reached this decision independently in arbitration without influence from any other court ruling. My orders in these arbitrations were based solely upon my own independent interpretation of Green Tree's consumer contracts and my own independent construction and application of South Carolina contract law. For clarification only, I issue this Order *nunc pro tunc*, retroactive to my initial Order in Arbitration.

Opp. App. 7a-8a.

On August 13, 2003, the bankruptcy court ruled that its prior Order lifting the stay to permit this Court's review did not allow action on remand pursuant to this Court's mandate. The bankruptcy court thus held that the arbitrator's August 12, 2003, order was void because it violated the automatic stay. Thereafter, the Bazzle/Lackey plaintiffs successfully moved the bankruptcy court to permit them to proceed in state court and before the arbitrator to carry out this Court's remand order.

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[4] On August 8, 2003, Green Tree for the first time notified the South Carolina Supreme Court of its filing for bankruptcy by filing with the court a suggestion of bankruptcy. Green Tree did not file any similar motion before the arbitrator.

On December 18, 2003, petitioner moved the South Carolina Supreme Court to vacate the trial court judgments before permitting the arbitrator to proceed. *See* Pet. App. 3a. Following full briefing on state-law procedures for sending the contract question to the arbitrator, the South Carolina Supreme Court denied Green Tree's motion, and ordered the matter be "remanded to arbitrator Thomas Ervin to determine whether class arbitration was permissible under the parties' contract." Pet. App. 3a.

At petitioner's request, the arbitrator held a conference with the parties on February 27, 2004. At the close of that proceeding, the arbitrator announced his decision and memorialized it in a written Supplemental Order, which, in pertinent part, provides:

> [t]he question of whether the subject arbitration clauses allowed for class arbitration has already been fully briefed and argued by the parties in the proceedings before me. I initially addressed the question of contract interpretation in the *Lackey* case, and held that Green Tree's arbitration agreement authorized class arbitration. I received briefs from the parties, and held a hearing on August 19, 1998, specifically to determine "whether or not a class action could be arbitrated pursuant to the Arbitration Agreement between the parties." Order dated August 29, 1998. As I explained in my final written award, "I determined that a class action should proceed in arbitration based upon my careful review of the broadly drafted arbitration clause prepared by Green Tree." Final Order and Award in Arbitration, July 24, 2000, quoted in *Green Tree v. Bazzle*, [__ U.S. __, 123 S. Ct.] at 2408. In reaching my decision, I relied on the terms of the arbitration agreement. I did not consider myself bound by the trial court's earlier class certification order in *Bazzle*. The parties did not argue, nor did I believe, that my determination of the question should be anything other than my own de novo decision. I only viewed the earlier *Bazzle* court order as persuasive

> —not binding—authority that supported my own reading of the contract language. It was then, and remains now, my independent construction that the agreement must be read to permit class arbitration.
>
> My determination in *Lackey* that the agreement authorized class arbitration applies with equal force in *Bazzle*. Moreover, I was required on several occasions to directly consider the class arbitration issue in the *Bazzle* matter. The first instance was when Green Tree moved to dismiss and decertify the class in *Bazzle*. My denial of that motion implicitly reaffirmed my earlier construction of the arbitration clause. The second instance was when the Bazzle Complaint was amended in arbitration at the request of Green Tree. The Amended Complaint asserted class allegations without objecttion from Green Tree. Green Tree also requested that the *Lackey* home improvement transactions be moved to and consolidated in the *Bazzle* arbitration proceedings. These events necessitated my independent determination that it was appropriate to proceed as a class action in the *Bazzle* matter.

Pet. App. 20a-22a. The arbitrator transmitted the Supplemental Order to the South Carolina Supreme Court. On March 1, 2004, petitioner filed its writ of mandamus with this Court.

Post-mandate Bankruptcy Proceedings. Meanwhile, when this case was on remand to the state courts, petitioner on August 13, 2003, initiated an adversary proceeding in the bankruptcy court seeking a declaration that the obligations under the supersedeas bonds had been discharged by this Court's decision. Petitioner had long before sold its interests in the collateral securing the supersedeas bonds.[5] The

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[5] Petitioner acknowledged that "[t]he cash collateralizing the Supersedeas Bonds and on bond with the South Carolina courts has been sold to CFN as part of the CFN Sale Transaction. Thus, to the extent that any such cash is released, it will not become property of Conseco's estates, if

bankruptcy court dismissed the adversary action, abstaining in favor of a state court decision on the status of the bonds. On September 9, 2003, the bankruptcy court held its final confirmation hearing and entered an order confirming the liquidation plan. On December 18, 2003, that court granted leave to proceed in the South Carolina courts in the underlying actions. Those proceedings progressed, as described above, but are not yet complete.

REASON FOR DENYING THE WRIT

This Court directed that this case be remanded to the South Carolina Supreme Court for further proceedings. The South Carolina Supreme Court then submitted the matter to the arbitrator for clarification as to whether he arrived at his interpretation of the arbitration clause independently, or whether the arbitrator actually disagreed with the state trial court but erroneously believed that he was bound by that court's view that the arbitration clause permitted class proceedings. The arbitrator has now made unmistakably clear that it was, and is, his own independent view that the clause permits class arbitration. The South Carolina Supreme Court correctly rejected petitioner's argument that this Court's mandate implicitly required the state high court to vacate the arbitral awards and lower court judgments confirming them. The petition for an extraordinary writ of mandamus is wholly baseless and should be denied.

Petitioner's liability for violating the South Carolina Consumer Protection Code has been conclusively determined in arbitration. The arbitrator has now repeatedly held that the governing arbitration clause permits class arbitration. Petitioner fails to establish any of the exceptional grounds for

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it ever was." Debtor's Obj. to Emerg. Mot. for Order Clarifying Automatic Stay, at 5 n. 2, *In re Conseco, Inc.*, No. 02 B 49672 (Bankr. N.D. Ill. filed July 9, 2003)

issuance of a writ of mandamus. Such a writ would amount to this Court taking the exceptional and unwarranted step of intruding into South Carolina's administration of its own courts, even before the state court proceedings are complete. Petitioner seeks mandamus, not to assure compliance with this Court's decision, but rather to upset a conclusive judgment against it so that it might contend that reinstatement of the judgment is unsecured, and is thus virtually nullified due to petitioner's bankruptcy liquidation. Even if petitioner were successful in obtaining vacatur, the arbitrator's decision would compel its immediate reinstatement, with the only difference being that petitioner would then argue that the reinstated judgment would be "new," unsecured, and more recent for purposes of calculating post-judgment interest. The writ should not be used to manipulate the formalities of state court procedure and undermine the substance of respondents' recovery, but should instead be denied.

I. THERE IS NO BASIS FOR THE EXTRAORDINARY REMEDY OF MANDAMUS.

Petitioner has shown no circumstances—let alone the "clear and indisputable" grounds—warranting mandamus. *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976). "Because mandamus has 'the unfortunate consequence of making the judge a litigant,' the Court has stressed that it should be 'reserved for really extraordinary causes.'" *Pulliam v. Allen*, 466 U.S. 522, 538 (1984), *quoting*, *Ex Parte Fahey*, 332 U.S. 258, 260, (1947). A writ of mandamus is an extraordinary remedy only available when a petitioner demonstrates a threat of irreparable injury. *Graddick v. Newman*, 453 U.S. 928, 933 (1981). A party seeking issuance of a writ of mandamus must show that the grounds are "exceptional," his right to the writ

is "indisputable," and that he has "no other adequate means to attain the relief he desires." *Kerr,* 426 U.S. at 403; Sup. Ct. R. 20.1.

Petitioner is not threatened with irreparable injury or any other extraordinary circumstance that could justify mandamus. Petitioner contends that the South Carolina Supreme Court failed to execute the mandate of this Court insofar as it did not vacate the awards of the arbitrator or the state trial courts' judgments confirming them. Pet. 2. The state court's action complied with the mandate and is fully in accord with state law. The mandate sought only to discover whether the arbitrator had acted independently in reading the arbitration clause to permit class arbitration and, if he had not, to discover his independent view. The South Carolina Supreme Court, following full briefing on the state procedural questions, correctly carried out the mandate when it remitted the issue to the arbitrator, and the arbitrator's view is now clear.

To be entitled to mandamus, a party must establish that a clear and indisputable right is threatened by the lower court. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). If the mandate or judgment of the Supreme Court leaves a question open for the exercise of discretion by the lower court, the decision of the latter cannot be reversed by mandamus. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256 (1895); *In re Potts*, 166 U.S. 263, 265-266 (1897); *Ex Parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900). Petitioner cites to no rule of law, procedure or statute that clearly and undisputably establishes its right, or this Court's authority, to direct the procedures by which the South Carolina Supreme Court remitted the state law contract interpretation question to the arbitrator.

The state high court's decision to return the matter directly to the arbitrator is a matter of state procedural law and judicial discretion. Petitioner unsuccessfully made the same

argument to the South Carolina Supreme Court that it asserts here—that this Court's mandate not only vacated the South Carolina Supreme Court's order affirming the final arbitration awards, but that it also implicitly vacated the arbitral awards and the lower courts' judgments entering them as final orders. The state high court correctly rejected that contention.

Petitioner's request for a writ of mandamus is nothing more than an attempt to involve this Court in micro-managing the South Carolina Supreme Court's administration of the state court system. "This Court repeatedly has recognized that States have important interests in administering certain aspects of their judicial systems." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12-13 (1987). This Court properly declined to interject itself into the state judicial process when it issued the mandate in this case. In this case, this Court gave no specific instructions to the South Carolina Supreme Court, other than to obtain a clear determination from the arbitrator.[6] The South Carolina Supreme Court, in turn, returned the matter to the arbitrator without interfering or attempting to interfere with the arbitral process. The absence in this Court's mandate of any direction to the state high court to vacate the underlying judgments is dispositive here.

The essence of the relief petitioner seeks is to (1) vacate the existing judgments; (2) require respondents to obtain a judgment that might be interpreted as "new," and thus arguably unsecured by the existing bonds and/or unable to support the accrued post-judgment interest; and (3) thereby to eviscerate respondents' recovery. Nothing in the mandate requires the additional relief petitioner seeks, and such relief

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[6] Compare, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999)(vacating a judgment of the Ninth Circuit, remanding and instructing the Ninth Circuit to vacate the judgment of the District Court.).

would be antithetical to the actual result intended by the arbitrator and the state courts in this protracted litigation.

General Atomic Co., v. Felter, 436 U.S. 493 (1978) (per curiam) on which petitioner principally relies, fails to support mandamus in this case. There, the Court had earlier enjoined the state court, on Supremacy Clause grounds, from preventing General Atomic from asserting federal claims in federal forums. When the state court repeated that error on remand from this Court, the Court, although declining to issue a formal writ of mandamus, again disapproved the state court's effort to bar proceedings appropriate to federal judicial or arbitral forums. There is no similar error here of any state court acting beyond its constitutional authority in contravention of an earlier mandate. Petitioner's reliance on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is similarly misplaced. *See* Pet. 18. *Munsingwear* stands only for the proposition that a judgment may by eliminated in a moot case. If anything is moot in this case, it is petitioner's contention that the FAA or this Court's mandate are violated. Now that the arbitrator has more fully explained and reaffirmed the grounds for his original awards, there can be no dispute that petitioner has already obtained the contemplated enforcement of the arbitration clauses "according to their terms." Pet. App. 12a; *see* Pet. 21 (acknowledging that further proceedings after petitioner's desired vacation of the judgment "might result in new judgments that potentially could be reconciled with the requirements of the FAA"). Neither the mandate, state law, nor the FAA requires more.

II. THE PETITION IS PREMATURE AND SEEKS TO CIRCUMVENT THE ORDINARY APPELLATE PROCESS.

The extraordinary writ of mandamus does not serve as a substitute for the ordinary appellate procedures. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-383 (1953);

Heckler v. Ringer, 466 U.S. 602, 616 (1984). Such writs are only to be used when, for some special reason, the appellate process does not provide an adequate remedy. *Id.* Petitioner's request for the issuance of a writ of mandamus is an apparent attempt to circumvent the normal appellate process.

The state high court's order of February 20, 2004, was an order remanding the case to the arbitrator for further consideration consistent with this Court's opinion.[7] For the third time, the arbitrator has independently concluded that the arbitration clause permitted class arbitration. Petitioner has not yet appealed or otherwise challenged that ruling in the state system. If petitioner has a colorable complaint with regard to the arbitrator's decision, it should pursue it through the state court system. Were it to do so, it would be subject to the stringent limits on judicial review applicable to any decision issued in binding arbitration. *See Pittman Mortgage Company v. Edwards*, 327 S.C. 72, 76-77 (1997); *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509-510 (2001).

Petitioner instead comes to this Court with a spurious argument that a writ of mandamus must be issued, but mandamus cannot be employed to circumvent ordinary appellate procedures. The arbitrator has ruled and informed the South Carolina Supreme Court of his decision, but the

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[7] Petitioner had an opportunity to be heard before the arbitrator, and, if it believed additional submissions were necessary, it could have submited a brief or proposed order to the arbitrator outlining its position. It reasonably did not do so, however, because it had nothing new to say. As the arbitrator pointed out in his Supplemental Order, "the question of whether the subject arbitration clauses allowed for class arbitration has already been fully briefed and argued by the parties in the proceedings before me. Thus, I find no need for an additional hearing in order to render the decision required by the United States Supreme Court." Pet. App. 20a-21a. Petitioner's gratuitous innuendoes (*e.g.* Pet. 9, 21, 23) that the arbitrator's decision not to hear further evidence was improper, or that the arbitrator is somehow non-neutral, are baseless at best.

South Carolina Supreme Court has not yet acted on the arbitrator's decision.[8]

To interfere with the South Carolina Supreme Court before it issues its final order in this case would interfere with the principles of federalism established in *Younger v. Harris*, 401 U.S. 37 (1971). *See Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982). When the South Carolina Courts complete their proceedings, the parties can take any appropriate steps, as needed, to protect their rights. No extraordinary relief can be required of this Court at this time.

III. THE FEDERAL ARBITRATION ACT DOES NOT SUPPORT MANDAMUS

Petitioner argues that because this Court vacated the South Carolina Supreme Court's decision below, the FAA somehow requires vacation of the underlying arbitral awards and trial court judgments confirming them. This Court directed only that the South Carolina Supreme Court's opinion be vacated, and that further proceedings be held consistent with the Court's opinion. Nothing in the FAA, or in this Court's opinion or mandate, dictates how these proceedings be held.

It is well established that parties may contract for state law procedures to govern their arbitration agreement, *Volt Information Sciences, Inc. v. Board of Trustees of Leland*, 489 U.S. 468, 477 (1989), and in this case, the parties chose the

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[8] Petitioner has presented no evidence that the South Carolina Supreme Court has, or will, depart from the requirements of state law. State procedures delineate routes for obtaining clarification from trial courts or arbitrators without necessarily disturbing their judgments. Under its own rules, for example, the South Carolina Supreme Court may require a report "of a trial, or of any matter relative thereto" from a trial judge (in this case, the arbitrator). SCACR Rule 212(a). Such request for a report under Rule 212(a) does not require vacatur, but may, indeed, confirm the propriety of reaffirming an underlying judgment.

law of South Carolina.[9] "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Volt*, 489 U.S. at 479.[10] The South Carolina Supreme Court is free to employ whatever procedure it deems appropriate to comply with the Supreme Court's mandate in this case, as long as it is consistent with the FAA's goals of not frustrating private arbitrations. Remanding this case to the arbitrator was fully consistent with state procedures and the FAA's policies promoting arbitration.

Throughout its petition, petitioner repeatedly mischaracterizes the arbitration awards as having been entered in violation of the FAA, and this Court's decision as having so held. This Court made no such holding, nor could it have. To the contrary, its decision was premised on the recognition that an arbitrator's independent interpretation of an arbitration clause as permitting class arbitration fully *accords* with the FAA. Even the lack of clarity at the time of this Court's

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[9] Green Tree's adhesion contract provided: "You agree this contract will be governed by the law of the State of South Carolina." R. App. 2162; *see* Pet. App. 13a ("the parties agreed that South Carolina law would govern their arbitration agreement").

[10] The terms of Section 9 reinforce that principle, providing that "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then . . . any party to the arbitration may apply to the court so specified for an order confirming the award." In this case, the parties specified that "[j]udgments upon the award rendered may be entered in any court having jurisdiction." Pet. App. 6a. When Green Tree chose South Carolina state courts as a proper forum for post-arbitration proceedings, it subjected itself to the procedural rules and authority of that court system. Having received the benefit of its bargain—post arbitration procedures "in a court having jurisdiction"—Green Tree cannot now object to the procedures in the very court that it selected.

plenary review as to whether the arbitrator's decision was independent did not thereby place the arbitrator's decision in conflict with the FAA. Now that the arbitrator has made unmistakably clear that he read the clause to permit class arbitration, there can be no doubt that the requirements of the FAA have been met.

Furthermore, Sections 9 and 10 of the FAA, on which petitioner relies, do not govern state court proceedings; by their plain language, they apply only to federal courts. Section 9 provides for confirmation of arbitral awards by application "to the United States court in and for the district within which such award was made," and Section 10 provides that, in specified, narrow circumstances, "the United States court in and for the district wherein the award was made may make an order vacating the award." 9 U.S.C. §§ 9, 10. This Court has never held that Section 9 and 10 apply to arbitrations of purely state-law, nondiversity claims such as the claims in this case. *See Southland v. Keating*, 465 U.S. 1, 16 n. 10 (1984) (declining to hold that FAA Sections 3 and 4 apply to state arbitrations).[11]

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[11] Green Tree seeks to bootstrap itself into the coverage of Sections 9 and 10 by generally contending that the parties "agreement" is governed by the FAA. Pet. 22. The arbitration clause only states, however, that Section 1 of the FAA applies. Pet. Opp. 6a. Moreover, the South Carolina Supreme Court, in originally rejecting petitioner's challenges and affirming the award, never decided that Section 10 applied, but cited to both state and federal standards for approval of arbitration awards.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted,

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April 2, 2004

APPENDICES

APPENDIX A

Court of Common Pleas

00-CP-18-793

LYNN W. BAZZLE and BURT A. BAZZLE, in a class representative capacity on behalf of a class and for all others similarly situated,

Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION, a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION, n/k/a CONSECO FINANCE, INC.,

Defendants.

ORDER

This matter came before the Court on November 5, 2002, on the Plaintiffs' Motion to Execute on Bond and the Defendant's Motion to Stay Enforcement of Judgment in the above captioned matter. Appearing for the Plaintiffs were Steven W. Hamm, Esquire, Bradford P. Simpson, Esquire, and Mary L. Arnold, Esquire. Appearing for the Defendant were Herbert W. Hamilton, Esquire and Robert C. Byrd, Esquire. The Defendant moves to stay enforcement of the judgment in this case pending review of the Defendant's petition for a writ of certiorari filed with the United States Supreme Court on October 23, 2002, and beyond if the U.S. Supreme Court grants the petition. The Plaintiffs oppose the granting of a stay and seek to execute on the Supersedeas Bonds obtained in this case or, in the alternative, additional security by the Defendant in the form of a supplemental supersedeas bond pursuant to Rule 62(d), SCRCP.

After carefully reviewing and considering the memoranda and arguments of counsel, the Court finds that the Defendant's Motion shall be conditionally granted upon the Defendant's immediate deposit of $823,000.00 by wire transfer to an interest-bearing account, identified as *Bazzle v. Green Tree*, Civil Action Number 97-CP-18-258, to be established by Cheryl Graham, Clerk of Court for Dorchester County, at First Citizens Bank by noon on Friday, November 15, 2002, to cover interest accruing through January 15, 2003. The Defendant's timely compliance with this requirement shall stay enforcement of the judgment in this matter until January 16, 2003. The funds deposited into the aforesaid account pursuant to this Order, and the interest earned on such funds, shall not be withdrawn from the depositary institution without an Order of this Court authorizing such withdrawal. Notwithstanding the foregoing sentence, Counsel may continue to examine interest rates available at other insured financial institutions and the Clerk of Court is authorized to transfer funds deposited pursuant to this Order to such other financial institution as may provide a higher interest rate on such deposited funds.

This stay may be extended for a period of sixty (60) days by the Defendant's deposit of $401,799.00 by wire transfer into the above-referenced account at First Citizens Bank no later than noon on January 15, 2003. The Defendant may continue to extend this stay in such manner until such time as the U. S. Supreme Court finally disposes of this matter by depositing $401,799.00 by noon on the last day of this stay. Thus, the Defendant may extend this stay for sixty (60) days to March 16, 2002, by depositing $401,799.00 no later than noon on January 15, 2003. The stay could then be stayed further by the deposit of $401,799.00 by noon on March 16, 2002, and so on. If any deadline should fall on a day on which First Citizens Bank is not normally scheduled to

be open for business, the deadline shall be extended until noon on the next business day immediately following such deadline.

AND IT SO ORDERED!

/s/ Patrick R. Watts
Special Circuit Court Judge

November 6, 2002
Summerville, South Carolina

APPENDIX B

Court of Common Pleas

96-CP-06-0073

DANIEL B. LACKEY, GEORGE BUGGS and FLORINE BUGGS,
in a representative capacity on behalf of a class and
for all others similarly situtated,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORP., *et. al.*
Defendants.

ORDER

This matter came before the Court on November 4, 2002, on the Defendant's Motion to Stay Enforcement of Judgment in the above captioned matter. Appearing for the Plaintiffs were Steven W. Hamm, Esquire, Bradford P. Simpson, Esquire, and Les Cotter, Jr., Esquire. Appearing for the Defendant was Herbert W. Hamilton, Esquire and Robert C. Byrd, Esquire. The Defendant moves to stay enforcement of the judgment in this case pending review of the Defendant's petition for a writ of certiorari filed with the United States Supreme Court on October 23, 2002, and beyond if the U.S. Supreme Court grants the petition. The Plaintiffs oppose the granting of a stay absent additional security by the Defendant in the form of a supplemental supersedeas bond pursuant to Rule 62(d), SCRCP.

This Court, on July 22, 2002, ordered the Defendant to provide a Supplemental Supersedeas Bond to cover accruing interest of approximately $1,022,000.00, for the period of March 22, 2002, to September 22, 2002, to provide adequate

security to the Plaintiffs on the appeal of this case to the South Carolina Supreme Court.

After carefully reviewing and considering the memoranda and arguments of counsel, the Court finds that the Defendant's Motion shall be conditionally granted upon the Defendant's immediate deposit of $1,022,000.00 by wire transfer to an account, identified by Civil Action Number 96-CP-06-073, to be established at Regions Bank by noon on November 5, 2002. This deposit shall be made pursuant to the July 22, 2002, Order issued by this Court and shall be deemed in compliance with that Order. In addition, this stay shall also be conditioned upon the Defendant's timely deposit of $773,900.53 by wire transfer to the same account at Regions Bank by noon on Monday, November 11, 2002, to cover interest accruing through January 15, 2003. The Defendant's timely compliance with these requirements shall stay enforcement of the judgment in this matter until January 16, 2003. Counsel may continue to examine rates available at other insured financial institutions and is authorized to transfer funds deposited pursuant to this Order to such other financial institution as may provide a higher rate on such deposited funds.

This stay may be extended for a period of sixty (60) days by the Defendant's deposit of $292,684.00 by wire transfer into the above-referenced account at Regions Bank no later than noon on January 15, 2003. The Defendant may continue to extend this stay in such manner until such time as the U. S. Supreme Court finally disposes of this matter by depositing $292,684.00 by noon on the last day of this stay. Thus, the Defendant may extend this stay for sixty (60) days to March 16, 2002, by depositing $292,684.00 no later than noon on January 15, 2003. The stay could then be stayed further by the deposit of $292,684.00 by noon on March 16, 2002, and so on. If any deadline should fall on a day on which Regions

Bank is not normally scheduled to be open for business, the deadline shall be extended until noon on the next business day immediately such deadline.

AND IT SO ORDERED!

/s/ Rodney A. Peeples
Circuit Court Judge

November 6, 2002
(nunc pro tunc for November 4, 2002)
Aiken, South Carolina

APPENDIX C

ON REMAND
SUPREME COURT OF SOUTH CAROLINA

U.S. Supreme Court 02-634

GREEN TREE FINANCIAL CORPORATION,
Appellant,

v.

LYNN W. BAZZLE *et al.*,
Respondents.

ORDER OF THE ARBITRATION ON REMAND

This matter was remanded to me from The Supreme Court of South Carolina in accordance with the decision of the United States Supreme Court in Green Tree Financial Corp. v. Bazzle, 123 S.Ct. 2402 (June 23, 2003). I wish to clarify my prior rulings that the arbitration clause contained in those adhesion contracts written by Green Tree were silent as to class certification in arbitration. The arbitration clause granted to the arbitrator "all powers provided by the law and the contract. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief, and injunctive relief." I applied South Carolina contract law in construing this broad arbitration clause drafted by Green Tree. I concluded that since the arbitration clause was silent as to class treatment that class certification was appropriate. I reached this decision independently in arbitration without influence from any other court ruling.

My orders in these arbitrations were based solely upon my own independent interpretation of Green Tree's consumer contracts and my own independent construction and application of South Carolina law.

For clarification only, I issue this Order *nunc pro tunc*, retroactive to my initial Order in Arbitration.

/s/ Tom J. Ervin Arbitrator
TOM J. ERVIN
ARBITRATOR

August 12, 2003
Greenville, South Carolina

APPENDIX D

THE SUPREME COURT OF SOUTH CAROLINA

LYNN W. BAZZLE and BURT A. BAZZLE, in a representative capacity on behalf of a class and for others similarly situated

vs.

GREEN TREE FINANCIAL CORP., *et. al.*

DANIEL B. LACKEY, GEORGE BUGGS and FLORINE BUGGS, in a representative capacity on behalf of a class and for all others similarly situated,

vs.

GREEN TREE FINANCIAL CORP., *et. al.*

LETTER

August 6, 2003

Dear Mr. Ervin:

We have received the mandate in the above entitled matter. The United States Supreme Court remanded this case to this Court for further proceedings not inconsistent with the opinion of that Court. In light of this, the matter is being returned to you as arbitrator for further proceedings. Any issues relating to the bond in connection with this should be given to Judge Peeples who is the circuit court judge that has been appointed by the Chief Justice to hear any matters pertaining to the bond.

Very truly yours,

/s/ Brenda F. Shealy
Deputy Clerk

cc: The Honorable Rodney A. Peeples